Jiang Xin Shipping Co Ltd v FGV Trading Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-27NCC-41–07 OF 2016
AZIZAH NAWAWI J
15 MARCH 2018

Admiralty and Shipping — Bills of lading — Delivery of cargo without surrender of original bills of lading — Plaintiff's vessel arrested — Plaintiff claimed indemnity from defendant pursuant to letter of indemnity issued by defendant — Whether plaintiff entitled to indemnity — Interpretation of letter of indemnity

Shipping and Navigation — Admiralty — Indemnity — Plaintiff delivered cargo without original bills of lading — Plaintiff's vessel arrested — Plaintiff claimed indemnity from defendant pursuant to letter of indemnity issued by defendant — Whether plaintiff entitled to indemnity — Interpretation of letter of indemnity

The plaintiff was the registered owner of the vessel MT 'Yue You 902' ('Yue You 902') whereas the defendant was a company in the business of trading palm oil and palm oil products. The parties had entered a charterparty for the carriage of crude palm oil ('the cargo') from Lubuk Gaung Indonesia to New Mangalore, India. The defendant had also entered into a business arrangement with Aavanti Industries Pte Ltd for the sale of the cargo. The said sale was financed by Oversea-Chinese Banking Corp Ltd ('OCBC'). The defendant had also issued a letter of indemnity ('LOI') under which the defendant agreed to indemnify the plaintiff of all the liability, loss and damages which the plaintiff has sustain from the release of the cargo without the production of the original bills of lading ('the BOLs'). On 24 April 2016, Yue You 902 arrived at New Mangalore, India and the cargo was delivered to Ruchi Soya Industries Ltd between 27 April 2016 and 29 April 2016. Problems arose when Yue You 902 was arrested in Singapore ('the Singapore proceedings') premised on the warrant of arrest issued in the instance of the OCBC, the original holder of the BOLs in respect of the cargo discharged in New Mangalore. In view of the Singapore proceedings, the plaintiff brought the present action for indemnity against the defendant premised on the LOI. The plaintiff prayed for: (a) indemnity of the losses incurred by the plaintiff in connection with the arrest of Yue You 902 and GNG Concord 1; (b) damages to be assessed; and (c) if the LOI, on its proper construction, did not respond to a delivery in New Mangalore, an order rectifying the LOI by substituting the word 'CHENNAI'

to 'NEW MANGALORE' be made pursuant to s 30 of the Specific Relief Act 1950 and/or in equity and/or inherent jurisdiction of the court. In opposing the plaintiff's action, the defendant contended that the LOI that they had issued was for the delivery of the Cargo to Chennai, not New Mangalore, as such, since the cargo was discharged in New Mangalore and not Chennai, then the LOI was not engaged. The main issue was on the interpretation of the LOI.

Held, allowing the plaintiff's action with costs:

(1) Based on the evidence, it was the common intention of the parties that the LOI was to cover the discharge of the cargo at New Mangalore and not Chennai. The single reference to Chennai in the LOI was an obvious bona fide mistake. Further, the initial communication by the defendant to the plaintiff's demand for compensation over the arrest of the vessel did not raise the issue that the LOI was not triggered because the delivery was made in New Mangalore, not Chennai. The court found that the defendant's contention that the word 'Chennai' was not a mistake was a mere afterthought and an attempt to scuttle its responsibility under the LOI. The court ruled that the LOI was engaged and the defendant was to indemnify the plaintiff of all liability, loss and damages which the plaintiff had sustained from the release of the cargo without the production of the original BOLs (see paras 20, 24, 26 & 28).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar kapal MT 'Yue You 902' ('Yue You 902') manakala defendan adalah syarikat yang berdagang minyak kelapa sawit dan barangan minyak kelapa sawit. Pihak-pihak telah memasuki penyewaan kapal bagi pengangkutan minyak sawit mentah ('kargo') dari Lubuk Gaung Indonesia ke New Mangalore, India. Defendan juga telah memasuki penyusunan perniagaan dengan Aavanti Industries Pte Ltd bagi jualan kargo tersebut. Jualan tersebut dibiayai oleh Oversea-Chinese Banking Corp Ltd ('OCBC'). Defendan juga telah mengeluarkan surat indemniti ('SI') di mana defendan berjanji untuk membayar kepada plaintif kesemua liabiliti, kerugian dan ganti rugi yang mana ditanggung oleh plaintif semenjak perlepasan kargo tersebut tanpa pengeluaran bil muatan asal ('BMA'). Pada 24 April 2016, Yue You 902 tiba di New Mangalore, India dan kargo tersebut dihantar ke Ruchi Soya Industries Ltd di antara 27 April 2016 dan 29 April 2016. Masalah berbangkit apabila Yue You 902 ditangkap di Singapura ('prosiding Singapura') berdasarkan waran penangkapan yang dikeluarkan kepada OCBC, pemegang asal BMA berkaitan kargo yang dilepaskan di New Mangalore. Mengambil kira prosiding Singapura, plaintif memfailkan tindakan ini untuk indemniti terhadap defendan berdasarkan SI tersebut. Plaintif memohon untuk: (a) indemniti bagi kerugian yang ditanggung oleh plaintif berhubung dengan penangkapan Yue You 902 dan GNG Concord 1; (b) ganti rugi untuk ditaksir; dan (c) jika SI, atas pentafsirannya yang betul, tidak menjawab kepada

penghantaran di New Mangalore, pesanan yang membetulkan SI dengan menggantikan perkataan 'CHENNAI' kepada 'NEW MANGALORE' dibuat berikutan s 30 Akta Relief Spesifik 1950 dan/atau bersamaan dan/atau bidang kuasa inherens mahkamah. Dalam membantah tindakan plaintif, defendan berhujah bahawa SI yang dikeluarkan oleh mereka adalah untuk penghantaran kargo ke Chennai, bukan New Mangalore, oleh itu, memandangkan kargo dilepaskan di New Mangalore dan bukan Chennai, dengan SI tidak boleh diguna pakai. Isu utama adalah pentafsiran SI tersebut.

Diputuskan, membenarkan tindakan plaintif dengan kos:

(1) Berdasarkan ke atas keterangan, ia adalah niat biasa pihak-pihak bahawa SI adalah untuk melindungi perlepasan kargo di New Mangalore dan bukan Chennai. Rujukan tunggal kepada Chennai dalam SI adalah jelas kesilapan bona fide. Selanjutnya, komunikasi permulaan defendan terhadap tuntutan plaintif untuk pampasan ke atas penangkapan kapal tidak membangkitkan isu bahawa SI bukan dicetuskan kerana penghantaran dibuat di New Mangalore, bukan Chennai. Mahkamah mendapati hujahan defendan bahawa perkataan 'Chennai' bukan kesilapan hanya sesuatu yang difikirkan kemudian dan percubaan untuk mengurangkan tanggungjawabnya di bawah SI tersebut. Mahkamah memutuskan bahawa SI boleh digunakan dan defendan hendaklah membayar plaintif kesemua liabiliti, kerugian dan ganti rugi yang ditanggung oleh plaintif akibat perlepasan kargo tanpa pengeluaran BMA asal (lihat perenggan 20, 24, 26 & 28).]

Notes

For a case on delivery of cargo without surrender of original bills of lading, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1329.

For cases on indemnity, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1256–1257.

Cases referred to

Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd) [2015] 1 MLJ 656; [2014] 1 LNS 1897, CA (folld)

Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, HL (refd)

Scottish Power plc v Britoil (Exploration) Ltd and other [1997] All ER (D) 76; [1997] EWCA Civ 2752, CA (refd)

Legislation referred to

Specific Relief Act 1950 s 30

TS Oon (Jessica Teng with him) (TS Oon & Partners) for the plaintiff.

Arun Krishnalingam (Sativale Mathew Arun) for the defendant.

Azizah Nawawi J:

INTRODUCTION

[1] The plaintiff's case against the defendant is for indemnity in respect of the arrest of the vessels 'Yue You 902' in Singapore and 'GNG' in South Africa, and for damages.

[2] Having considered the evidence and the submission of the parties, this court has allowed the plaintiff's case with costs.

THE SALIENT FACTS

[3] The plaintiff is a company incorporated in Hong Kong, China with its registered office at 14/F, Chu Kong Shipping Tower, 143 Connaught Road Central, Hong Kong. The plaintiff is the registered owner of the vessel MT 'Yue You 902'.

[4] The defendant is a company incorporated in Malaysia having its registered office at Level 45, Menara Felda, Platinium Park, No 11, Persiaran KLCC, Kuala Lumpur. The defendant is in the business of trading palm oil and palm oil products, whether sourced from plantations owned by FGV Holdings Bhd or elsewhere.

[5] The plaintiff has entered into a charterparty with the defendant for the carriage of 10,000 metric tons of RBD Palm Olein and/or Crude Palm Oil ('cargo') from Lubuk Gaung, Indonesia to New Mangalore, India ('the charterparty'). The defendant has a business arrangement with Aavanti Industries Pte Ltd ('Aavanti') for the sale of the cargo, and the said sale was financed by Oversea-Chinese Banking Corp Ltd Bank ('OCBC'). The bills of lading were then delivered to OCBC.

[6] Pursuant to the charterparty, the plaintiff's vessel 'Yue You 902' was loaded with the cargo and 14 bills of lading dated 15 April 2016 ('BOLs') were issued by the plaintiff. The BOLs were all issued 'to order'.

[7] Clause 11 of the charterparty allowed the defendant to require the plaintiff to discharge the defendant's cargo without the original BOLs premised on the defendant's letter of indemnity. Clause 11 reads:

If original bills of lading are not available for presentation at discharging port(s) prior to vessel's arrival, vessel to discharge the charterer's entire cargo to receivers against charterer's LOI (with text according to owner's PNI Club format) without any supporting bank guarantee.

[8] The defendant issued the letter of indemnity dated 22 April 2016 for the delivery of the said cargo ('LOI'). Under the LOI, the defendant agreed to indemnify the plaintiff of all liability, loss, damages which the plaintiff has sustain from the release of the cargo without the production of the original BOLs.

[9] The 'Yue You 902' arrived at New Mangalore, India on 24 April 2016 and the cargo was delivered to Ruchi Soya Industries Ltd ('Ruchi') between 27–29 April 2016 by the plaintiff's authorised agent, Deep Sea Shipping Logistics.

[10] On 27 May 2016, the plaintiff entered into a new voyage charterparty with Nova Carriers (Singapore) Pte Ltd ('Nova') in respect of the vessel 'Yue You 902'.

[11] On 16 June 2016, the 'Yue You 902' was arrested in Singapore premised on the warrant of arrest issued at the instance of Oversea-Chinese Banking Corp Ltd Bank ('OCBC'), who are the original holder of the BOL in respect of the cargo discharged in New Mangalore.

[12] In view of the Singapore proceedings, the plaintiff then filed this action for indemnity against the defendant premised on the LOI dated 22 April 2016. The main prayers against the defendant, inter alia, are as follows:

(a) indemnity of the losses incurred by the plaintiff in connection with the arrest of the 'Yue You 902' and 'GNG Concord 1';

(b) damages to be assessed; and

(c) if the LOI, on its proper construction, does not respond to a delivery in New Mangalore, an order rectifying the LOI by substituting the word 'CHENNAI' to 'NEW MANGALORE' be made pursuant to s 30 of the Specific Relief Act 1950 and/or in equity and/or inherent jurisdiction of the court.

THE FINDINGS OF THE COURT

[13] Since the parties cannot agree on the 'issues to be tried', and having considered the pleadings, the evidence and the submission of the parties, I am of the considered opinion that the core issue here is on the interpretation of the LOI dated 22 April 2016, which reads:

> The above cargo was shipped on the above ship by the above shipper and consigned to above consignee for delivery at the port *NEW MANGALORE, INDIA* but the bill of lading has not arrived and we FGV TRADING SDN BHD, hereby request you to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED or to such party as you believe to be or to represent top RUCHI SOYA INDUSTRIES LIMITED at *CHENNAI, INDIA* without production of the original bill of lading.
>
> In consideration of your complying with our above request, we hereby agree as follows:
>
> 1. *To indemnity you, your servants and agents* and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of discharging the cargo in accordance with our request.
>
> 2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the discharge of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
>
> 3. If, in connection with the discharge of the cargo as aforesaid, *the ship or any ship or property in the same or associated ownership, management of control be arrested* or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), *to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship* or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention of such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
>
> ...
>
> 7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England. (Emphasis added.)

[14] The defendant takes the position that the LOI that they have issued is for the delivery of the cargo to Chennai, not New Mangalore. Therefore, since the cargo was discharged in New Mangalore and not Chennai, then the LOI was not engaged. This is based on the following provision in the LOI:

> The above cargo was shipped on the above ship by the above shipper and consigned to the above consignee for delivery at the port *NEW MANGALORE, INDIA* but the bill of lading has not arrived and we FGV TRADING SDN BHD, hereby request you to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED or to such party as you believe to be or to represent RUCHI SOYA INDUSTRIES LIMITED at *CHENNAI, INDIA* without production of the original bill of lading ... (Emphasis added.)

[15] The plaintiff however takes the following position:

(a) that the LOI must be properly interpreted to apply to the cargo discharged at New Mangalore; and/or

(b) that even if the LOI, on its strict interpretation, does not respond to the delivery in New Mangalore, the court should grant an order rectifying the LOI by the substitution of the word CHENNAI' to 'NEW MANGALORE' pursuant to s 30 of the Specific Relief Act 1950 and/or in equity and/or inherent jurisdiction of the court. The remedy of rectification is available to the plaintiff whether it is a case of mutual mistake or unilateral mistake.

[16] The issue here is on the interpretation of the LOI. As this case involves the construction of a commercial contract, reference is made to the decision of the Court of Appeal in *Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd)* [2015] 1 MLJ 656; [2014] 1 LNS 1897, where Justice Azahar Mohamed said as follows:

> [32] The management agreement is a commercial contract. *It therefore must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial person would construe them* (see *Mannai Investment v Eagle Star* [1997] 3 All ER 352). The construction of a contract is a question of law to be determined by the court and the court is not bound by the admission of witnesses or the concession made by counsel (see *NVJ Menon v The Great Eastern Life Assurance Company Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96). *To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties.* To ascertain the parties' intention, the court does not of course inquire into the parties' subjective states of mind but *make an objective judgment based on the materials already identified (see Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896). (Emphasis added.)

[17] In *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, Lord Wilberforce said this:

> No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is a legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. *In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.*

His Lordship further stated that, just as the intention of the parties is to be ascertained objectively, so also:

> ... when one is speaking of aim, or object, or commercial purpose, one is *speaking objectively of what reasonable persons would have in mind in the situation of the parties*. (Emphasis added.)

[18] In determining the extent of the 'surrounding circumstance' which may properly be admitted as an aid to interpretation, Staughton LJ opined in the case of *Scottish Power plc v Britoil (Exploration) Ltd and other* [1997] All ER (D) 76; [1997] EWCA Civ 2752 that:

> ... '*surrounding circumstances*' should be confined to *what the parties had in mind, and what was going on around them at the time when they were making the contract*. (Emphasis added.)

[19] Therefore, premised on the above cases, the duty of this court is to ascertain the intention of the parties, by reading the LOI as a whole, look the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties, at the time the contract was made. And in order to ascertain the parties' intention, the court does not inquire into the parties' subjective states of mind but make an objective judgment based on the materials already identified.

[20] Having considered the evidence, I find that for all intent and purpose, the parties' intention in the LOI is that the delivery of the cargo is to New Mangalore, not Chennai. This is based on the following reasons:

(a) that the voyage is clearly stated in the LOI to be from Indonesia to New Mangalore. It reads as follows:

> FROM LUBUK GAUNG, INDONESIA *TO NEW MANGALORE INDIA* CARGO: 9999.964 MT RBD PALM OLEIN OF EDIBLE GRADE IN BULK.

(b) that the word 'CHENNAI' only appears once in the LOI, and is ambiguous and inconsistent with the rest of the LOI which mention the word 'NEW MANGALORE' twice:

> FROM LUBUK GAUNG, INDONESIA *TO NEW MANGALORE INDIA*
>
> ...
>
> The above cargo was shipped on the above shipper and consigned to the above consignee for delivery at the port of *NEW MANGALORE INDIA* but the bill of lading has not arrived and we FGV TRADING SDN BHD, hereby request you to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED or to such party as you believe to be or represent to RUCHI SOYA INDUSTRIES LIMITED at *CHENNAI*, INDIA without production of the original bill of lading.

(c) that the parties, at all material times had intended that the cargo is to be discharged at New Mangalore, and this is supported by the defendant's witness, DW1, under examination-in-chief and under cross-examination:

> *Witness Statement of DW1:*

18 Q: *Was there supposed to be a delivery of the cargo at Chennai*? **A**

A: *No, there was not* ...

DW1 further testified under cross-examination that it is the mutual intention of both parties that the LOI should cover the discharge of the cargo at New Mangalore: **B**

OTS: Now please look at, as I said we are on the LOI now. If you look at page 77, the words 'at Chennai, India'. Now you have already confirmed and accept that nobody contemplated the discharge of cargo at Chennai.

ZUL: New Mangalore. **C**

OTS: *Always at New Mangalore*. Correct?

ZUL: *Yes.*

OTS: Yes. And when you issued this letter of LOI, and I just confirm again, on the next page, it is your signature, isn't it? **D**

ZUL: This is my signature.

OTS: Page 78. Yes, your signature, right? So you issued that on behalf of FGV Trading. So if it was in your contemplation and mutual intention of the parties that the LOI should cover the discharge of the cargo at New Mangalore, when you issued this LOI, did you notice the words 'at Chennai, India'? **E**

ZUL: Yes, I did.

OTS: If that is the case, *then this LOI does not accord with the mutual intention of the parties.* Do you agree or disagree? **F**

ZUL: *Yes, correct.*

OTS: So knowing that this LOI did not accord with the intention of the parties, you nevertheless issued the LOI in this form? **G**

ZUL: Yes, I still issue.

(d) the plaintiff, through the evidence of PW1, PW2 and PW3 said that at all material times, both the plaintiff and the defendant intended that the cargo was to be discharged and delivered to Ruchi at New Mangalore, India: **H**

At all material times, both the Plaintiff and the Defendant intended that the Cargo was to be discharged and delivered to Ruchi at New Mangalore, India ...

(e) that all the 14 BOLs provided that the place for delivery of the cargo is at New Mangalore: **I**

Consignee/Order of

TO ORDER

Notify Address

RUCHI SOYA INDUSTRIES LIMITED,

... INDIA

On board the tanker

MT YUE YOU 902 V 1605

At the port of

LUBUK GAUNG, INDONESIA

To be delivered to the port of

NEW MANGALORE, INDIA

(f) that at the request of the defendant by email dated 8 April 2016 through AC Tankers, the discharge port was changed to New Mangalore. This is reflected in Addendum 01 to the charterparty which provides that the discharging port is changed to New Mangalore with additional freight imposed. The emails dated 8 April 2016, 11 April 2016 and 12 April 2016 from the defendant's agent, AC Tankers read:

Date	Email from AC Tankers
8 April 2016	Attn: Mr Xu Re: Mt Yueyou 902 V1605/CP 11 March 2016 (1st Voy) Chtrs request to have an option to discharge at new mangalore. Pls advice if you are able to grant such option & addl frt required
11 April 2016	Dear Mr Xu MT Yueyou Mt Yueyou 902 V1605/CP 11 March 2016 Laycan 10–25 April 2016 Addendum 01 It is mutually agreed between the owners & the charterers that 1) The discharging port is changed to New Mangalore 2) An additional freight of usd 4.00 pmt is payable for New Mangalore All other terms and conditions remain unchanged.

12 April 2016	Attn: Mr Xu, Chilli Re: Mt Yueyou 902 V1605/CP 11 March 2016 (1st Voy) Please find the below REVISED intended loading plan for mt Yueyou 902 V1605 Load port: Lubuk Gaung, Indonesia Discharge port: New Mangalore Tentative Cargo Breakdown: One grade 10,000 mt Rbd Palm Olein Load/Discharge port agents: At Lubuk Gaung: ... At New Mangalore: Deep Sea Shipping Logistics

(g) that in his evidence, DW1 has admitted that the delivery of the cargo was to be made in New Mangalore. DW1 said this:

> 8. Q: Tell us about the charterparty.
>
> A: As the contract was on a CNF basis, it was FGVT's obligation to arrange for the shipment of the cargo to Ruchi Soya. The defendant then entered into a charterparty, again through brokers, for the voyage charter of the vessel YUE YOU 902 with the plaintiff. The charterparty dated 11th March 2016 can be seen at pages 150 to 161 of CBD 2. This is the Clean Fixture Recap issued by the Broker AC Tanker Services Pte Ltd for two voyages of 10,000 MT each from ports in Malaysia/Indonesia to discharge ports in either Chittagong or several ports in India. *Subsequently, as a result of the request from Aavanti for the delivery to be made to New Mangalore instead, the plaintiff agreed to allow discharge at New Mangalore* with the added consideration of USD 4.00 per MT with all the other terms and conditions remaining unchanged. This is reflected in the Addendum 01 issued by AC Tankers through their email dated 11th April 2016 which can be found at page 162 of CBD 2.

(h) that the defendant has actually paid for the additional freight charges for the changing of the discharge port to New Mangalore. The defendant has paid the sum of USD256,499.08, and this clearly shows that the defendant was aware that the intended port of discharge was New Mangalore;

(i) that the change in the discharge port was requested by the defendant so that the defendant could perform their sale contract No TS1604221496 with their buyer Aavanti Industries Pte Ltd dated 5 April 2016. The said sale contract provided for delivery 'CNF Mangalore';

(j) that the draft LOI was prepared by the defendant's agent/broker AC Tankers and the same was forwarded to GNG for approval vide an email

from Ms Carol of AC Tankers on 18 April 2016. The said cover email from Ms Carol of AC Tankers to GNG, addressed to Ms Chilli Ren and PW3 forwarding the draft LOI states that:

> Pls find attached draft LOI for *delivery of cargo without OBL at New Mangalore* for your approval.

(k) that the cover email from Ms Chilli Ren of GNG to Mr Shashi Nair of Deep Sea dated 22 April 2016 forwarding the cargo release instruction also makes specific reference to the cargo to be released/discharged in New Mangalore. The said cover email reads:

> Dear Mr Shashi Nair,
>
> Pls find attached yy902 v1605 *cgo release order at NEW MANGALORE,* Thanks.

(l) that the defendant obtained a back-to-back letter of indemnity from its cargo buyer, Aavanti Industries Pte Ltd, on identical terms as the LOI, except that there is no reference to 'Chennai, India' in the letter of indemnity issued by Aavanti Industries Pte Ltd. The Avanti LOI, which is identical to the defendant's LOI reads as follows:

> Ship: YUE YOU 902 V1605
>
> Voyage: FROM LUBUK GAUNG, INDONESIA
>
> *TO NEW MANGALORE INDIA*
>
> *CARGO: 9999.964 MT RBD PALM OLEIN OF EDIBLE GRADE IN BULK.*
>
> ...
>
> The above cargo was shipped on the above ship by the above shipper and consigned to the above consignee for delivery at the port of *NEW MANGALORE INDIA* but the bill of lading has not arrived and we AAVANTI INDUSTRIES PTE LTD, hereby request you to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED or to such party as you believe to be or represent RUCHI SOYA INDUSTRIES LIMITED at *NEW MANGALORE, INDIA* without production of the original bill of lading.

(m) that in the letter dated 27 June 2016 from the defendant to Aavanti Industries Pte Ltd, the defendant has admitted that the cargo has been discharged at New Mangalore, 'acting in accordance with the terms of the LOI' issued by the defendant. The said letter reads:

> In response to your request and in reliance of your representations and undertakings contained in the LOI, we had issued our LOI to the carrier, Jiang Xin Shipping, on identical terms requesting the carrier to deliver the cargo upon arrival to your identified party Ruchi Soya Industries Ltd without production of the originals of the bills of lading.

The vessel landed the cargo at New Mangalore from 24April to 29 April 2016, and *acting in accordance with the terms of the LOI issued by us,* the carrier discharged and delivered the cargo into the custody and possession of Ruchi without production of the originals of the bills of lading.

[21] I also accept the evidence of PW3 who said that the word 'Chennai' on the LOI was a mistake. PW3 was the person who approved the draft LOI, which was forwarded by Ms Carol of AC Tankers. On the issue of the word 'Chennai', PW3 explanation is as follows:

25. Q: Can you tell the Court why did you approve the draft LOI forwarded by Ms Carol of AC Tankers even though it contains error ie the reference to 'Chennai India'?

A: The LOI is a standard document which the Defendant has issued to the Plaintiff on many occasions in the past for other shipments. AC Tankers are very familiar with the preparation of the LOI as I have dealt with them on many occasions on the issuance of similar letters of indemnity by the Defendant.

I did not check the wordings of the LOI in details as I trust that AC Tankers have inserted the correct particulars in the LOI. In any event, the mistake did not cause any confusion as both the Plaintiff and the Defendant clearly intended that the Cargo delivery to Ruchi is to take place at New Mangalore, India, as explained in my answer to question 24 above.

[22] With regards to the issue of AC Tankers, I accept the evidence of the plaintiff that AC Tankers was acting as the agent of the defendant, as it was the defendant who had requested the plaintiff to discharge the cargo without the production of the original BOLs, and the defendant also knew that they have to provide the LOI to the plaintiff under cl 11 of the charterparty before the plaintiff can accede to their request. Any reasonable shipper would not simply discharge the cargo without the original BOL or an LOI. This can be seen from AC Tankers email dated 8 April 2016 to the plaintiff:

Attn: Mr Xu

Re: Mt Yueyou 902 V1605/CP 11.03.2016 (1st Voy)

Chtrs request to have an option to discharge at new mangalore. Pls advice if you are able to grant such option & addl frt required.

[23] Further to that, the opening paragraph of the LOI states that it was the defendant requesting the delivery of the cargo to Ruchi without the production of the original BOL:

The above cargo was shipped on the above ship by the above shipper and consigned to above consignee for delivery at the port NEW MANGALORE, INDIA but the bill of lading has not arrived and *we FGV TRADING SDN BHD, hereby request you to deliver the said cargo to RUCHI SOYA* INDUSTRIES LIMITED or to such party as you believe to be or to represent RUCHI SOYA INDUSTRIES LIMITED at

CHENNAI, INDIA *without production of the original bill of lading.* (Emphasis added.)

[24] The defendant also submits that the word 'Chennai' was not a mistake, and that if there had been a mistake, the mistake was wholly that of the plaintiff's. However, I find that this is not probable, as the initial communication by the defendant to the plaintiff's demand for compensation over the arrest of the Yue You did not raise the issue that the LOI was not triggered because the delivery was made in New Mangalore, not Chennai. The defendant's response reads:

> Regarding this matter, the vessel owner have no right to put FGVT on notice.
>
> *We as a CNF seller have completed our responsibility with the owner since the vessel has completed loading and discharge accordingly a per normal shipping practise.*
>
> Furthermore, there is no outstanding freight and the *cargo also has been discharged via FGVT's LOI produced by the owner upon we received Aavanti's LOI* (please refer Aavanti LOI as per attached).
>
> On the other hand, FGVT have fully received payment from our contractual party, M/S Aavanti and technically we considered this shipment is fully completed.
>
> QQ
>
> The above cargo was shipped on the above ship by the above shipper and consigned to the above consignee for delivery at the port of NEW MANGALORE INDIA but the bill of lading has not arrived and we, AAVANTI INDUSTRIES PTE LTD, hereby request you to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED or to such party as you believe to be or represent to RUCHI SOYA INDUSTRIES LIMITED at NEW MANGALORE, INDIA without production of the original bill of lading.
>
> UNQQ
>
> Kindly be informed that we are not to be held responsible for any cost and consequence that might arise.

[25] Therefore, the initial response from the defendant towards the plaintiff's legal demand is that there has been a good delivery with no outstanding payments. The defendant had also attached the LOI issued by Aavanti which clearly show that the discharge port was New Mangalore, not Chennai.

[26] Furthermore, the defendant did not respond to the two letters of demand dated 17 and 18 June 2016 issued by the plaintiff's solicitor in China, to deny liability on the basis that the LOI does not cover a discharge at New Mangalore. When the plaintiff's solicitor in Malaysia issued another letter of demand dated 11 July 2016, the defendant's solicitor made no reference to the issue of 'Chennai'. Therefore, I find that the defendant's contention that the

word 'Chennai' was not a mistake was a mere afterthought after the event, and an attempt to scuttle its responsibility under the LOI.

[27] On the issue of the application of English law, I am of the considered opinion that this is only applicable if the parties submit to the jurisdiction of the High Court of Justice of England. In this case, the parties have submitted to the jurisdiction of the High Court of Malaya, so therefore this court will apply the decision of the Court of Appeal in *Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd)* in construing the LOI.

[28] Therefore, premised on the above evidence, I find that it is the common intention of the parties that the LOI was to cover the discharge of the cargo at New Mangalore. Therefore, having read the LOI as a whole, I am of the considered opinion that the parties have intended that the port of discharge is New Mangalore, not Chennai. The single reference to Chennai in the LOI was an obvious bona fide mistake. I therefore find that the LOI is engaged and the defendant is to indemnify the plaintiff of all liability, loss, damages which the plaintiff has sustain from the release of the cargo without the production of the original BOLs.

Plaintiff's action allowed with costs.

Reported by Dzulqarnain Ab Fatar